

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBBIE BOLLER)	
Claimant)	
VS.)	
)	Docket No. 166,488
SAINT MARY HOSPITAL)	
Respondent)	
AND)	
)	
CONTINENTAL INSURANCE COMPANY)	
Insurance Carrier)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed Administrative Law Judge Bryce D. Benedict's December 7, 2000, Award. The Appeals Board heard oral argument on May 2, 2001, in Topeka, Kansas.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared on behalf of the claimant. Kip A. Kubin of Overland Park, Kansas, appeared on behalf of the respondent and its insurance carrier. Mark Works of Topeka, Kansas, appeared on behalf of The Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant had permanently injured her neck and low back while working for the respondent on May 13, 1992. The ALJ further found those permanent injuries resulted in an 18 percent permanent functional impairment

and awarded a 47.5 percent work disability. The ALJ denied claimant's request for an additional 6.57 weeks of temporary total disability compensation, finding claimant failed to prove she was temporarily and totally disabled for those weeks.

On appeal, claimant argues she proved that her work-related injuries have rendered her permanently and totally disabled or, in the alternative, she is entitled to a higher work disability. Claimant contends that the ALJ erred when he found the vocational expert's opinion on claimant's loss of ability to find employment in the open labor market, utilizing Dr. Dale E. Darnell's work restrictions, was not admissible competent evidence because Dr. Dale E. Darnell did not testify in this case. Claimant also argues she provided uncontradicted testimony that she was temporarily and totally disabled for a period of 6.57 weeks from February 10, 1995, through March 27, 1995, and she is, therefore, entitled to an additional 6.57 weeks of temporary total disability compensation.

Conversely, the respondent, its insurance carrier and the Kansas Workers Compensation Fund (Fund), at oral argument before the Appeals Board (Board), requests the Board to affirm the ALJ's 47.5 percent permanent partial general disability award based on a work disability, the 18 percent permanent functional impairment rating finding and the finding that claimant failed to prove she is entitled to 6.57 weeks of additional temporary total disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and the parties' oral arguments, the Board makes the following findings and conclusions:

The Board finds the ALJ's Award should be affirmed. The Board agrees claimant retains the ability to perform at least sedentary employment opportunities, e.g., working as a cashier. Those job opportunities would pay claimant at least minimum wage of \$5.15 per hour for full time employment of 40 hours per week or \$206.00 per week. The Board also agrees with the ALJ's conclusion that claimant, after her May 13, 1992 accident, failed to make a good faith effort to find appropriate employment.¹ Thus, the Board concludes that claimant retains the ability to earn comparable wages and the wage component of the work disability test is zero. Additionally, the Board agrees that the vocational expert's opinion on claimant's loss of ability to perform work in the open labor market utilizing Dr. Darnell's work restrictions lacks foundation testimony of the physician and is inadmissible.²

¹ See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

² See K.S.A. 44-519 and Roberts v. J.C. Penney, Co., 263 Kan. 270, Syl. ¶3, 949 P.2d 613 (1997).

The Board, therefore, as stipulated to by the respondent and Fund, at oral argument, concludes claimant is entitled to a permanent partial general disability award of 47.5 percent based on the average of a 0 percent wage loss and a 95 percent loss of ability to perform work in the open labor market.³

In regard to claimant's request for additional weeks of temporary total disability compensation, the Board agrees with claimant's contention that medical testimony is not essential in establishment of the existence, nature and extent of the injured worker's disability.⁴ Thus, claimant's testimony alone can establish whether she was temporarily and totally disabled from engaging in any substantial and gainful employment.⁵ But, in this case, the Board finds claimant's testimony failed to provide sufficient proof that she was entitled to an additional 6.57 weeks of temporary total disability compensation. Claimant first testified that after her back surgery, she was unable to work for the period from February 10, 1995 through March 27, 1995. Claimant was then asked, "Were you paid temporary total disability benefits for that period of time?" She replied, "I believe so."⁶ The parties stipulated that respondent paid claimant a total of \$10,215.09 of temporary total disability benefits at \$118.68 per week. No specific dates, however, were provided as to the period of weeks paid. The Board concludes that, in this case, claimant's testimony alone failed to prove that those additional 6.57 weeks of temporary total disability compensation were not part of the 86.07 weeks already paid by respondent.

The Board further agrees with the findings of fact and conclusions of law that are set out in the Award. It is not necessary to repeat those findings and conclusions. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bryce D. Benedict's December 7, 2000, Award should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

³ See 1991 Supp. 44-510e(a).

⁴ See Graff v. Transworld Airlines, 267 Kan. 854, Syl. ¶3, 783 P.2d 258 (1999).

⁵ See Augustine v. Phil Blocker, Inc., WCAB Docket No. 233,213 (Sept. 2000).

⁶ Regular Hearing, October 19, 2000, p. 24.

Dated this ____ day of November, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Kip Kubin, Attorney for Respondent
Mark Works, Attorney for the Kansas Workers Compensation Fund
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director